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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NO. 423.

SHAWKEE MANUFACTURING COMPANY,
GLENSHAW GLASS COMPANY,
McKEE GLASS COMPANY,
GEORGE R. HAUB, Petitioners,

v.

HARTFORD-EMPIRE COMPANY, Respondent.

REPLY MEMORANDUM OF SHAWKEE ET AL. ON THEIR PETITION FOR WRIT OF CERTIORARI.

WILLIAM B. JASPERT,
Counsel for Petitioners.

December 8, 1943.

SMITH BROS. CO. INC., LAW PRINTERS, 434-436 BOULEVARD OF ALLIES, PITTSBURGH, PA.

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Respondent's allegation that Certiorari is inappropriate because Petitioners do not seek review of the lower court's holding that the Clarke article did not affect the Court's judgment, and that the newly discovered facts of the fraud effected through the use of the Clarke article does not qualify as after discovered evidence, is contrary to the fact. Petitioners are seeking a review of both questions which are specifically raised as Nos. 2 and 4 under Questions Presented (P. 9) of Petition and as assignments of error, Nos. 2 and 3 (P. 12) of Petition. They were, as Respondent argues, dispositive of the case in the court below but they are

not, we submit, determinative of the question of setting aside a judgment procured by fraud upon the court.

Respondent's Brief offers several attractive trails which, if followed, would lead to confusion. There are some allegations, however, upon which comment may be helpful. The assertion that the statements of the Clarke article are true is contradicted by the record. Respondent relies upon the Affidavits of its counsel, Brown, Dorsey and Hatch, the perpetrators of the fraud upon the Patent Office as establishing the truth of the article. When the matter was first called to the attention of Judge Buffington at the time when counsel for Petitioners' knowledge extended only to the fact that it had been submitted to the Glass Budget by Hatch, none of these counsel made known to the Court that the Clarke article had been written by Hatch for use in the United States Patent Office to procure allowance of broad claims. The Affidavits made, after the filing of the Petition in the Court below when all the facts were known to Petitioners' counsel from the record of the Government Anti-Trust Suit, can therefore be given little credence.

The Affidavit of Clarke relied upon by Respondent as establishing the truth of the article is contradicted by the Wood Affidavit from which the Respondent quoted in its Brief in the court below as follows:

> "Mr. Clarke finally said: 'You have been entirely open and frank with me and I am going to lay the cards on the table for you. I did not write that article. It was prepared and written by a Mr. Hatch, an attorney for the Hartford-Empire Company and he induced me to sign it, which I did'.

Mr. Clarke also told me that he had nothing to do with the getting together of the alleged data appearing in the article." (emphasis supplied)

The allegation that Hatch did not know the article was to be used in the Patent Office is contradicted by Carter's letter (R. 7) written to the president of the Owens Bottle Company:

"It occurs to me that I should make myself more clear about the purpose of this Hatch article.

"He has prepared it with the idea of getting it printed under the name of some apparently unprejudiced authority, *and then calling the attention of the Patent Office Examiner to the article as published,* in the belief that the Examiner will thereby be influenced to a more favorable consideration of Hartford's broad claims.

"Of course we are equally interested with Hartford in securing these broad claims, and therefore indirectly interested in having the article published." (emphasis supplied)

The chart of the Clarke article showing production curves of Respondent's feeding method and the Owens Machine method is *prima facie* false in that it does not show a drop in production for Respondent's feeding method in the depression of 1921 which Carter questioned (R. 10) in a letter written to Hatch:

"Am not sure that I quite understand your 'increase' line. The falling off for Owens in 1921 was entirely due, I take it, to the general collapse of business during that year, *and I should expect it to be more or less paralleled by a falling off in feeder production.* * * *" (emphasis supplied)

In his reply to Carter (R. 11) Hatch explained this discrepancy as follows:

> "I cannot understand why there was so much greater drop in the Owens production, unless it be that our production records are based on the *royalty paid* and it might be that the actual business done was *much less* than that indicated by the minimum royalties which had to be paid anyway." (emphasis supplied)

It was this seeming rise in the Respondent's production curve based on minimum royalties and not the production of glassware that was presented to the Patent Office and the court below as the authentic indication of the revolutionary character of the invention.

Further proof of the fact that the statements of the Clarke article as prepared by Hatch are untrue appears from the letter of Hatch to Carter (R. 10) in which he says:

> "I received this morning your letter relating to my proposed article on 'Feeding'. I appreciate your comments very much indeed and I think there is but one point on which you failed to appreciate my exact position. That is, I prepared this article so far as possible with reference only to the proceedings of The Bottle Blowers Association, *and knowingly and intentionally I reproduced some of the errors found therein.*
>
> "For example, in any statement as to the number of Owens machines in use, I have used the numbers given in the proceedings, *even when I knew this was not correct.* * * *" (emphasis supplied)

This letter further evidences that the Owens production as presented by the curve of the Clarke article was not based on the actual number of Owens machines in use. It was a mere estimate and based on figures which according to the above letter were false and knowingly and intentionally used. There is, therefore, no basis for the allegation that the Clarke article is true. Carter's own appraisal of the substance of the Clarke article is tersely stated in his letter to the president of his company (R. 10):

> "Under the circumstances, I do not see that we need be very critical in our treatment of the article. *If not too rank,* would say that we better let it go through. * * *" (emphasis supplied)

The Clarke Article cannot be both false in authorship and true in substance. That article sounded in the historic alarm of labor over advancement in labor-saving machinery. As the alarm of a labor leader it meant much to the Patent Office and the Court. As a compilation of facts and figures, even had those facts and figures been correct, it had but little persuasive force. It is the alarm engendered by the supposed achievement of Peiler which is reflected in the majority opinion of the Circuit Court of Appeals in the Hazel-Atlas case. Once persuaded as to the magnitude of Peiler's accomplishment, the Court was persuaded to concede to the Peiler patent much which a stricter analysis would have attributed to the prior art.

Respondent in charging petitioners with laches and knowledge of the genesis of the Clarke article and the deceptive design and use of its spurious authorship is attempting to attribute to Petitioners' counsel knowl-

edge which they did not have. While it might have been apparent at the time the matter was called to the attention of Judge Buffington that Respondent was the instigator of the Clarke article there was no evidence that Hatch had written the article until after the Government Anti-Trust Suit. The correspondence shows only that Petitioners believed, but had no proof, that the publication of the article was inspired by Respondent. This is two steps removed from knowledge that Respondent inspired the article and three steps removed from the fact that it wrote the article.

The assumption by the lower court in the majority opinion that the correspondence was transmitted to the whole court, which was differently constituted than now, may be questioned by the fact that it was not taken seriously especially because Judge Woolley had written a dissenting opinion in the Hazel case. The fact that it was not taken seriously, indicates that the court regarded the correspondence as reflecting unreliable hearsay rather than proof of the actual fraud.

In the Appendix to its brief, Respondent reviews the many proceedings by which Petitioners sought rehearings in the court below and in this court and then under heading "Shawkee's Inactivity From 1934 to 1941" charges Petitioners with laches. The history of this case which Respondent has especially called to the attention of this court evidences that Petitioners left nothing undone and were extremely diligent in bringing all matters to the attention of the court including what knowledge it had of the spurious authorship of the Clarke article in an effort to seek a modification of the judgment that was compelled by the decision in the

Hazel case. It further evidences that Petitioners made every effort to remove its glass feeding equipment, which embodied the basic principles of the prior art Hitchcock Patent, from the dominant scope of Respondent's patent monopoly.

The petition for a Writ of Certiorari to the Circuit Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

WILLIAM B. JASPERT,

Counsel for Petitioners.

December 8, 1943.